Supreme Court, U.S.
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85-165

No.

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CHRISTOPHER BONWICH

Petitioner,

v.

ROSEMARY J. BONWICH

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF UTAH

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QUESTIONS PRESENTED

Whether the Supreme Court of Utah's presumption that an infant child should be placed with its mother, rather than an equally suitable father, deprives the father of due process as accorded in the Fourteenth Amendment?

Whether the Supreme Court of Utah erred, when determining the best interest of the child in a custody case, in not weighing the fact that of equally qualified parents only one was biological, thus denying the biological parent due process of law?

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U.S. Consitution, Amend. XIV

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No.

CHRISTOPHER BONWICH

PETITIONER

V.

ROSEMARY J. BONWICH

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

TO THE HONORABLE, THE CHIEF JUSTICE and ASSOCIATE JUSTICES of the Supreme Court of the United States:

Christopher Bonwich, Defendant-Petitioner herein, prays

that a writ of certiorari issue to review the decision of the Supreme Court of Utah affirming the custody of Petitioner's biological child to Respondent, the child's adoptive mother, pursuant to Title 30 Of the Utah Code Annotated (1984) Section (1) and (100).

OPINIONS BELOW

The opinion of the Supreme Court of Utah is printed in the Appendix hereto, infra, at page A1. The Decree of Divorce issued by the District Court of Weber County, State of Utah is printed herein, infra at page A9. The trial court's ruling as to the placement of Petitioner's biological child is excerpted from the trial transcript and appears infra at page A31.

JURISDICTION

The judgment of the Supreme Court of Utah was entered on April 8, 1985. A motion for a new trial was denied on December 8, 1983, by the District Court of Weber County. This same court determined the custody of BRYAN JOSEPH BONWICH on October 5, 1983, by Decree of Divorce. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF FACTS

Petitioner and respondent were married in Florida in 1981. Both parties were assigned there as Air Force officers. Soon after the marriage petitioner adopted the respondent's ten year old son who had been born out of wedlock and

respondent adopted petitioner's infant son, who had also been conceived out of wedlock by a different Air Force officer. The family unit was dissolved by Decree of Divorce after a little more than a year.

The District Court of Weber County placed Petitioner's biological child with Respondent, along with the Respondent's biological child, and Petitioner was ordered to pay child support for both children. Petitioner appealed that part of his Decree of Divorce which awarded custody of his minor son to the child's adoptive mother.

Petitioner argues that the trial court has erred in the placement of a child with an adoptive parent absent some "special showing of incompetence" on the part of the biological parent.

Further, petitioner argued that the court's award was based on gender biases which are in violation of petitioner's rights under the constitution.

The Decree of Divorce allowed for the Respondent to have custody of said child for eight months and the Petitioner to have four months of visitation.

REASONS FOR GRANTING THIS WRIT

A court can no longer assume that a mother is a more appropriate parent for a young child, absent a showing of unsuitability, than a father based on gender. Weinberger v. Wiesonfeld, 420 U.S. 636, 652 (1970). Such a

conclusion by a court clearly denies the father his right to due process. Stanley v. Illinois, 92 S.Ct. 1208 (1972).

It is clear that males can nurture young children as adequately as females. Granted there are those who excell over others of their gender, but no automatic presumption of guality of child rearing talents should be attributed to the female parent. A parent's unfitness must be established, not presumed. Evaluations in this area must be done on an individual bases. Stanley, supra.

Over the last few years most of the presumptions as to the status of females verus males have been examined and put aside as not based in fact. Traditional roles and relationships

are no longer a valid basis for legal conclusions. Stanton v. Stanton, 95 S.Ct. 1373 (1975). Women now have egual footing in the job market and the advantage of equal pay and the disadvantage of equal professional stress. It can not be presumed that women are home with only child care chores. Mississippi University for Women v. Hogan, 102 S.Ct. 3331 (1982). This situation has been determined to be the "proper subject of judicial notice." Stanton, supra.

Additionally, the child's best interest must be examined from all facets and not judged merely as to what's best for today, when that decision could have weighty ramifications in the future. True, child custody can be reassigned and proportioned over the years as the

child grows. However, not all relationships can be so easily reformed as the child develcpes. A child is malleable in the sense that as the child grows, enviornment, relationships, and feelings give shape and form to the developing person and personality.

In determining the best interest of the child in this case the court placed the biological parent and adoptive parent on the same footing. This was error. This in not to suggest that the obligations and relationships in law are not the same, but rather, that when evaluating the interest of the child, the court, after finding both parents egually qualified, should then take into consideration the impact on the child

of placing it with someone other than the biological parent.

To know ones biological parents is important. The plight of adoptive children searching for thier biological parents, although raised by loving adoptive parents, is public knowledge.

A child should not be deprived of an opportunity to bond to a biological parent, to grow under their supervision and in thier likeness. So also a biological parent should not lose their child where no abuse or neglect has occurred. Granted, when a biological and adoptive parent have shared in the raising of a child over the years, the distinction between the parents is minimized as the child has received the benifits of rearing by

the biological parent. But, such is not the situation in the instant case.

The child at issue came into the home of his biological father and adoptive mother only to be removed one year later by the adoptive mother to the home of his adoptive maternal grandparents, where he was to remain for five months. Thus, a separation existed from both of his parents.

The lower court gave weight to the testimony of an older child in the family who was the biological child of the mother and adoptive child of the father. This child's statements were viewed in a vacuum by the court, which did not consider the fact that the testifying child had been born out of wedlock by the Respondent and adopted by his maternal grandparents as an infant. This child had lived in

Petitioner's home for only a year, yet was asked to evaluate the traits of his biological mother under whose care he had resided his entire life, and an adoptive father he had known only for a short time; a period of time during which his mother elected to file for divorce.

Respondent's biological child was sent off to the grandparents' home with Petitioner's biological child, and it can be presumed that a portion of the younger child's care fell upon the older child, thus causing him to feel some responsibility for the child. As understandable as this response is, it is not sufficient to justify the placement of a child, and is certainly offensive if being used as a factor in removing a child from its biological parent.

The relationship between parent and child is constitutionally protected because of its importance. Quilloin v. Walcott, 98 S,Ct, 549 (1978). When weighing the best interests of a child a court must be very careful to consider only those issues which are relevant to the child under consideration, not the desires or expectations of the parents or the statements of a less than neutral child witness. The custody, care, and nurturing of the child will rest with the parent. Wisconsin v. Yoder, 92 S.Ct. 1526 (1972). The court must evaluate the child's best interest in terms of these individuals, not the reverse. Ford v. Ford, 83 S.Ct. 273 (1962). Without a showing of "incompetence" a court should entertain a presumption in favor of

the biological parent when deciding child custody. Huchinson v. Hutchinson, 649 P. 2d. 38 (Utah 1982). Robertson v. Robertson, 388 N.Y.S.2d. 576 (1976). A court should not do harm to the interest of the child when deciding a question of custody. Prince v. Massachusetts, 64 S.Ct. 438 (1944).

A child has a right to be placed in its biological home. A factor to be considered in determining child custody is whether one of the parents is biological. This conclusion is justified in that it does not bar an adoptive parent from receiving custody if more qualified.

The lower court in applying an egual standing rule has caused a child to be removed from its biological parent without consideration as to

that person's special link with the child. The lower court clearly attempted to remedy this unhappy situation by granting what amounts to "joint custody," in that the father has the child in his sole and uninterrupted custody for four months each year. This division of time in the life of a very small child is not the result of the careful application of the law, or a representation of the best interests of the child, but rather a band-aid applied to an already confused domestic situation.

The questions presented by this petition are of importance in that an assumption based on gender should not be allowed to stand, and the interests of children and their biological parents need to be preserved. Lehr v. Robertson, 103 S.Ct. 2985 (1983).

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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A1

IN THE SUPREME COURT OF

THE STATE OF UTAH

Rosemary J. BONWICH, Plaintiff

and Respondent,

v.

Christopher BONWICH, Defendant

and Appellant.

Nos. 19592, 19804

April 8, 1985

HOWE, Justice:

Defendant appeals from a decree of divorce awarding custody of his minor son to plaintiff, the child's adoptive mother. Plaintiff cross-appeals from the property division ordered in the decree.

Plaintiff and defendant were both Air Force officers of approximately the same rank and pay grade when they married in Florida in 1981. A few weeks later, defendant adopted plaintiff's ten-year-old son, Lawrence, and plaintiff adopted defendant's son, Bryan, who was born three days after the parties married. Bryan was born out of wedlock to another woman. Defendant and Bryan's natural mother had tenatively agreed prior to Bryan's birth to his adoption by a childless couple. When the

couple declined to adopt him because they wanted a girl, plaintiff contacted Bryan's natural mother who consented to plaintiff's adoption of Bryan. A little more than a year after the marriage, plaintiff instituted divorce proceedings that culminated in the decree here appealed.

Defendant contends that it was error to award his biological child to plaintiff, an adoptive parent, absent some "special showing of incompetence" of the biological parent. He claims that the custody award resulted from outdated gender biases which are constitutionally impermissible.

In determining custody of minor children under Utah law, a trial court "shall consider the best interests of the child and the past conduct and

demonstrated moral standards of each of the parties." U.C.A., 1953, § 30-3-10, as amended. The trial court here found that plaintiff had more warmth for the children than defendant, that the children were closer to her, that the maternal grandmother was a dedicated grandparent, that the child Lawrence had almost a paternal feeling toward his little brother and felt very responsible for him, that the mother's nurturing qualities were greater than those of the father, and that it was in the best interests of both children to leave them in the custody of the mother during the school year or the "stable period of the year" and give the father liberal visitation rights during the summer. Accordingly, the court awarded custody of Bryan to

plaintiff, subject to visitation with defendant for the months of May through August, with additional reasonable visitation rights in both parties during the times the child was with the other parent.

In Jensen v. Jensen, Utah, 660 P.2d 240 (1983), we reiterated and adhered to our long-held principle of extending to the trial court broad discretion in determining child custody. Citing Jorgensen v. Jorgensen, Utah, 599 P.2d 510 (1979), we stated that the best interests of the child frequently turn on numerous factors that the trial court is best suited to assess, given its proximity to the parties and the circumstances, and concluded that "[o]nly where trial court action is so flagrantly unjust as to constitute an abuse of

discretion should the appellate forum interpose its own judgment." Id. at 511, 512 See also Bushell v. Bushell, 649 P.2d 85 (1982); Kallas v. Kallas, Utah, 614 P.2d 641 (1980).

Defendant nonetheless urges us to apply a stricter standard here and to entertain a presumption in favor of the biological parent. He relies on Hutchison v. Hutchison, Utah, 649 P.2d 38 (1982), where we stated that "the paramount consideration is the best interest of the child, but where one party to the controversy is a nonparent, there is a presumtpion in favor of the natural parent." Id, at 40. See also Cooper v. DeLand, Utah, 652 P.2d 907 (1982), and Tuckey v. Tuckey, Utah 649 P.2d 88 (1982). However, those cases do not apply to the fact situation here, as they dealt

with the conflicting custodial claims of a parent and a nonparent. They must be narrowly read in their context where no adoption had taken place.

Plaintiff adopted Bryan in Florida. The judgment of adoption created the same relationship between her and the child that would have existed had Bryan been her legitimate blood descendant. Fla. Stat. § 63.172(1)(c) (1983). That judgment affects the status of Bryan and receives full faith and credit in our forum. In re Duquesne's Estate, 29 Utah 2d 94, 505 P.2d 779 (1973). Although defendant did not adopt Bryan under Florida law, adoption by acknowledgment is recognized under Utah law and confers on an illegitimate child the civil and social status of a legitimate child of

the natural father. U.C.A. 1953, § 78-30-12; 1/ Mace v. Webb, Utah, 614 P2d 647 (1980). Consequently, the legal relationship between plaintiff and defendant on the one hand and Bryan on the other has been, since the time of adoption and reception into the family, that of parents and child. Under both Utah and Florida laws, the status of an adopted child is in all respects identical with that of a natural child. The relationship of the adoptive parent and the child is the same legally as that of natural parent and child, with all the rights and all the duties of that relationship. U.C.A., 1953, § 78-30-10; Fla. Stat. § 63.172(1)(c) (1983). That status remains inviolate irrespective of a subsequent divorce. The presumption favoring a natural

parent over a nonparent is therefore inapplicable, and both parties came to court in this divorce action on equal footing.

The trial court did not abuse its discretion in giving overriding priority to the best interests of the child over the desires of defendant. Without discounting or even questioning the strong affection defendant bears for his son, plaintiff, as an adoptive mother, could well harbor feelings of equal intensity. 2/ The trial judge articulated his reasons, which appear earlier in this opinion, for making the custody award as he did. They fully support his decision. He also stated his reasons for granting the four-month visitation right to defendant. The record is devoid of

any sexist biases or prejudices. All statements made with respect to the better primary caretaker refer to this defendant and to this plaintiff and are substantiated by close observations of the family constellation.

As we recognized in Hutchison v. Hutchison, supra, despite the blood relationship, a strong mutual bond does not always develop between natural parent and child. If, indeed, as defendant so stoutly maintains, that bond manifests itself strongly as Bryan grows, that will be an appropriate time for the trial court under its continuing jurisdiction to consider whether defendant should be granted custody. For now, however, Bryan is a three-year-old boy, quite unaware of the difference between how

he is related to a loving mother and a loving father with whom he divides his time and who both furnish his superior care. Would that all children fare so well.

Plaintiff cross-appeals that she was denied an equitable division of certain assets of the marriage, but she does not attack the overall division of property as being inequitable or unfair. She refers to an exhibit placed in evidence, but that exhibit is not before us and has not been made part of the designation of record on appeal. The trial judge has considerable latitude in dividing the marital assets of the parties. His actions are indulged with a presumption of validity. Searle v. Searle. Utah, 522 P.2d 697 (1974). Here, he endeavored to divide in an

equitable manner the assets the parties had accumulated during their short marriage. We are precluded from substituting our own judgment absent a showing of inequity which has not been made.

The decree is affirmed. No costs are awarded

HALL, C.J., and STEWART, DURHAN and ZIMMERMAN, JJ., concur.

Footnotes

1/ Section 78-30-12 reads as follows: Adoption by acknowledgment.--The father of an illegitimate child, by puclicly acknowledging it as his own, receiving it as such with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such, and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption.

2/ See the comment by Justice Crockett in In re Adoption of D, 122 Utah 525, 252 P.2d 223 (1953), that "[m]any parents who have had both natural and adopted children attest that it was impossible to make a distinction between the affection they have for the natural and the adopted children."

A14

IN THE DISTRICT COURT,

SECOND JUDICIAL DISTRICT WEBER COUNTY

STATE OF UTAH

ROSEMARY J. BONWICH,	)	
Plaintiff,	)	CORRECTED DECREE OF
vs.	)	DIVORCE
CHRISTOPHER BONWICH,	)	
Defendant.	)	Civil No 83094

This matter having come on regularly for trial on the 7th day of January, 1983, and having been concluded on February 10, 1983, before the Honorable John F. Wahlquist, one of the Judges of the above entitled Court, sitting without a jury, at said trial, the plaintiff and defendant each being personally present in open Court and each testifying in their own behalf, and the plaintiff being

represented by her attorney, Pete N. Vlahos, and the defendant being represented by his attorney Findley P. Gridley, and plaintiff and defendant having called witnesses in their own behalf, exhibits having been offered and received from the respective parties, and the plaintiff having filed her objections to the proposed Findings of Fact and Conclusion of Law and Decree of Divorce, and the defendant having filed his Motion for Reconsideration of Child Custody, and said matter having come on regularly for trial on the 17th and 18th day of August, 1983, and plaintiff being personally present and being represented by her attorney, Pete N. Vlahos, and the defendant representing himself, and again each of the parties

having been sworn and testifying in their own behalf, exhibits having been offered and received, witnessess having been called, and the Court having made its Corrected Findings of Fact and Corrected Conclusion of Law, and the Court being fully cognizant of all matters pertaining therein, enters the following:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The plaintiff and the defendant are each awarded a Decree of Divorce, divorcing them one from the other. The divorces granted are to become final and absolute upon entry of the Divorce Decree.

2. The plaintiff is awarded the care, custody and control of the two minor children, to-wit: Lawrence David Bonwich, born January 15, 1972,

and Bryan Joseph Bonwich, born June 30, 12981. The defendant is awarded reasonable visitation with each of the said minor children, to include continuous visitation with the minor child, Bryan Joseph Bonwich, during the months of May, June, July and August of each and every year, and thirty (30) days continuous visitation with the minor child, Lawrence David Bonwich, each and every year. The costs of transportation of each of said children to and from their place of residence to effect the defendant's visitation are to be solely borne by him. The plaintiff is hereby required to inform the defendant of the residence address and location of each of the minor children, and to provide him with a current home telephone number, if there is one.

3. The defendant is to pay to the plaintiff the sum of $334.00 total child support for the minor children, Lawrence David Bonwich and Bryan Joseph Bonwich, payable in full on or before the 30th day of each and every month following entry of the Divorce Decree, until said children individually attain majority.

No child support payments will be required to be made by the defendant during any period of continuous visitation with either child for thirty (30) days.

4. Neither of the parties is awarded alimony, as each is self-supporting.

5. The plaintiff is be awarded the following described properties:

(a) Those personal properties owned and possessed by her

prior to the parties' marriage, except as otherwise herein awarded to the defendant.

(b) The .76 karat Tiffany set diamond ring.

(c) One gold medallion, owned and possessed by the defendant prior to the parties' marriage to be given by her to the minor child, LAWRENCE DAVID BONWICH.

(d) The 1982 Honda Civic automobile, subject to the purchase debt owing to the defendant's parents, Mr. and Mrs. Stephen L. Bonwich, in the balance of $3,000.00, together with interest at 9-1/2 percent per annum, as contracted, saving the defendant harmless therefrom.

(e) Her IRA account.

(f) 12.022 shares of Tri-Continential, Inc., corporate stock.

(g) The following items of personal property acquired by the parties subsequent to the marriage: Atari video game and seven cartridges; Sony Walkman II tape player; Coleman Holofill II sleeping bag; full size baby crib; high chair; Snugli baby carrier; diaper bag; diaper stacker; eight-wheel stroller; Gerry carrier; car seat; play pen; port-a-crib; table top infant seat; hand carried infant bed; baby bottles and feeding utensils; crib mattress and pad; crib sheets and bumper guard; musical baby mobile; Super Coupe baby walker/feeder; portable 12v bottle warmer; portable 12v coffee maker; two sleds; approximately 500 color

photographs; 52-piece set dinner glasses; gift sets of bath powder and cologne/perfume; Ca.8 paperback books; miscellaneous household and automotive supplies; and 48 packages knitting yarn.

(h) Her personal effects.

6. The defendant is awarded the following described properties:

(a) The real property situate in the State of Florida owned and possessed by him prior to the parties' marriage, subject to the mortgage debt which he should assume and pay saving the plaintiff harmless therefrom.

(b) His IRA account.

(c) The 1977 Pontiac Sunbird automobile owned and possessed by the plaintiff prior to the parties'

marriage, which automobile is free and clear of encumbrances.

(d) Those personal properties owned and possessed by him prior to the parties' marriage, except as otherwise herein provided, and specifically including the following: The balance of the shares of Tri-Continental corporate stock; 14.321 shares of Scudder International Fund corporate stock; 3 shares of General Electric Corporation corporate stock; 6 shares of Malone & Hyde Corporation corporate stock; and 50 shares of Savin Corporation corporate stock.

(e) The following items of personal property acquired by the parties subsequent to the marriage: Power law mower; telephoto lens; Hobart mixer and attachments; J.C.

Penney food processor; Craftsman electric drill; Club aluminum cookware set; BR 78x13 studded snow tires (2); Sears Diehard battery (for Chevy Nova); K-Mart car top carrier; galvanized dog bathing tub; baby book of child, Bryan Joseph Bonwich, plastic hot pot; Rubbermaid laundry basket; wood T.V. stand; 8" pipe wrench; 7 rolls 35 mm color film; queen size electric blanket; queen size quilted bedspread; wall decorations and pictures; bath towel set; queen size bed sheets (2); assorted hardware (nuts, bolts, screws, nails); Christmas door wreath and other Christmas decorations and lights; 6: wooden ladder; Craftsman pipe clamp and pipe; garden hoe; 21-pc. SAE socket set and case; Torpedo level, Stanley; Weller

soldering set; 4 C-clamps; Solidox welding torch and accessories; Loom frame hanging; 40 Ch. CB transceiver; magnetic CB antenna; two knit ski caps; 36 color photographs; two 26 x 1-3/8' bicycle tubes; heavy duty water nozzle; two "Bonwich" USAF fabric name tags; man's F-16 belt buckle; man's tan velour bath robe; 1977 Pontiac Repair Manual; Carbide-tipped masonry drill bit set; and Rubbermaid bath and shower caddy.

(f) The following items of personal properties which came with and belong in the Ogden home of the parties: Fireplace cover and tending set; crystal prism for dining room chandelier; locking mechanism for front storm door; Genie garage door transmitters (3); front door mat;

kitchen towel rack, and wall phone cover plate.

(g) His personal effects.

7. The real property acquired by the parties subsequent to their marriage and known by address of 5415 South 300 West, Washington Terrace, Weber County, Utah, should forthwith be sold. Until sold, the parties should be equally responsible for payment of the mortgage debt and maintenance expenses, if any. When sold, the net proceeds derived should be shared equally by the parties; and from the plaintiff's interest there should be deducted and paid to the defendant an amount equal to one months mortgage payment ($1,123.00).

However, should the defendant elect to use and occupy the said real property as a residence until sold, he

should be required to make payment of the total monthly mortgage debt during his period of occupancy, but will be reimbursed from the gross sales proceeds an amount equal to said monthly mortgage payments less an amount equal to that charge for base allowance for quarters and variable housing allowance, Hill Air Force Base, Utah.

8. That because of the defendant's failure to make the payments, the plaintiff will be entitled to the first $5,000.00 equity when the home is sold, and if there is no equity, the Court will make an adjustment at that time.

9. The defendant is required to assume and pay the prenatal expenses incurred in connection with the birth of the minor child, BRYAN JOSEPH

BONWICH, the Mountain West Visa account, and those debts and obligations individually incurred by him since the parties' separation, saving the plaintiff harmless therefrom.

10. The plaintiff is required to assume and pay the debts and obligations individually incurred by her since the parties' separation, saving the defendant harmless therefrom.

11. Each of the parties is hereby restrained from adversely affecting the defensant's career with the United States Air Force, in whatever manner and by whatever method.

12. The parties are each required, should the occasion requre, to claim their individual Constitutional privilege regarding

testifying, one against the other, in matters of concern and inquiry occurring prior to January 1 1983.

13. The parties are each required to forthwith execute and deliver all documents of title, transfer, or conveyance to accomplish the awards of real and personal properties granted by the Court.

14. The parties are to assume and pay their individual attorney's fees and costs of action incurred in prosecution of this matter, except the defendant shall pay to plaintiff $500.00 because of expense rendered to not returning child after visit.

15. That the plaintiff is granted a Judgment for $1,002.00 for delinquent support for the months of

June, July and August, 1983 in sum of $1,002.00.

DATED this 5th day of October 1983.

/s/JOHN F. WAHLQUIST,
DISTRICT JUDGE